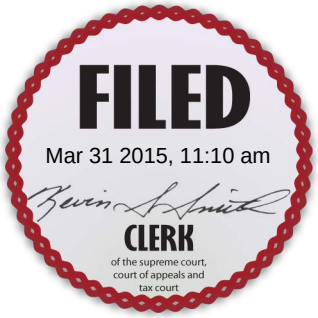
MEMORANDUM DECISION



APPELLANT PRO SE

Michael J. Weis
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE

Gregory F. Zoeller
Attorney General of Indiana

Angela N. Sanchez
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael J. Weis,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

March 31, 2015

Court of Appeals Case No. 26A04-1409-CR-444

Appeal from the Gibson Circuit Court

The Honorable David D. Kiely, Judge

Cause No. 26C01-0311-FA-6

Najam, Judge.

Statement of the Case

[1] Michael J. Weis appeals from the post-conviction court's denial of his petition for post-conviction relief. Weis presents three issues for our review, which we consolidate and restate as two issues:

> 1. Whether the post-conviction court erred when it denied Weis' petition without a hearing.
>
> 2. Whether the post-conviction court erred when it did not make specific findings of fact and conclusions of law on the issues presented in Weis' petition.

We affirm.

Facts and Procedural History

[2] The facts underlying Weis' convictions were stated by this court in his direct appeal:

> On March 21, 2003, the Gibson County Division of Family and Children ("GCDFC") removed seven-year-old J.S. and her half-brother from the home of her mother and Weis, J.S.'s stepfather, after receiving complaints about unsanitary conditions at the home. When interviewed about returning to the Weis's home, J.S. told Juanita Working, the Director of Gibson County CASA, that Weis had molested her. J.S. later described to Gibson County Sheriff's Deputy Deborah Borchelt . . . a pattern of abuse by Weis that began when J.S. was three years old. J.S. told Deputy Borchelt that Weis repeatedly engaged in vaginal, anal, and oral sex with J.S. . . .

> The State charged Weis with four counts of child molesting, two as Class A felonies and two as Class C felonies, and one count of Rape, a Class B felony.[] Following a jury trial, Weis was convicted on all counts. Due to double jeopardy concerns, the trial court entered judgment only upon the two convictions for child molesting as Class A felonies. Following the sentencing hearing, the trial court imposed an enhanced sentence of forty-years imprisonment on each count, to be served concurrently.

Weis v. State, 825 N.E.2d 896, 899-900 (Ind. Ct. App. 2005). Weis appealed his convictions, and this court affirmed in April of 2005. Weis also sought resentencing in 2009, but his petition was denied.

[3] In 2013, Weis filed a petition for post-conviction relief on three grounds:

> 1. That the legal definition of child molesting via deviate sexual conduct is irrational and arbitrary and therefore violates Article 1, Section 12 of the Indiana Constitution and the First Amendment of the U.S. Constitution;
>
> 2. That the legal definition of child molesting via deviate sexual conduct imposes unequal privileges and immunities that are not uniformly applicable and are not equally available to all persons similarly situated and therefore violates Article 1, Section 23 of the Indiana Constitution and the Fifth Amendment of the U.S. Constitution; and
>
> 3. That the legal definition of child molesting infringes upon the rights of parents to determine the education of their children with respect to matters of human sexuality consistent with their moral and religious beliefs, in violation of Fourteenth Amendment substantive Due Process and the Free Exercise Clause of the First Amendment to the U.S. Constitution.

App. at 19. The post-conviction court summarily dismissed Weis' petition on August 22, 2014. This appeal ensued.

Discussion and Decision

Issue One: Denial of Petition Without a Hearing

[4] Weis first contends that the post-conviction court erred by summarily dismissing his petition without holding a hearing. Indiana Post-Conviction Rule 1(4)(g) provides that:

> [t]he court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

A summary disposition of a petition for post-conviction relief under Indiana Post-Conviction Rule 1(4)(g) presents a question of law, which we review *de novo*, as we would a grant of summary judgment. *Pierce v. Martin*, 882 N.E.2d 734, 737 (Ind. Ct. App. 2008).

[5] Further, post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007) (citing *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999)). Our supreme court has held that

"[p]ost[-]conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available," and "if an issue was known and available, but not raised on direct appeal, it is waived." *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) (citing *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999)).

[6] Here, Weis asserts that material questions of law and fact remain to be addressed and that a reversal and remand for an evidentiary hearing is necessary.[1] He contends that his claims implicate important constitutional rights and represent fundamental error. *Canaan v. State*, 683 N.E.2d 227, 235 (Ind. 1997). Specifically, Weis claims that Indiana's child molesting statute

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[1] The post-conviction court elected to proceed on affidavits, as opposed to a fact-finding hearing, and while we review the post-conviction court's ultimate disposition de novo, *Pierce v. Martin*, 882 N.E.2d 734, 737 (Ind. Ct. App. 2008), the court's decision to proceed on affidavits is reviewed for abuse of discretion. *Fuquay v. State*, 689 N.E.2d 484, 486 (Ind. Ct. App. 1997). Indiana P-C.R. 1(9)(b) states that,

> [i]n the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony.

We have held that "it is the court's prerogative to determine whether an evidentiary hearing is required, along with the petitioner's personal presence, to achieve a 'full and fair determination of the issues raised[.]'" *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005) (quoting *Allen v. State*, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003)). Because Weis submitted no affidavits raising possible issues of fact, and because, as discussed below, he stated no cognizable claims in his petition, Weis was entitled to neither an evidentiary hearing nor oral argument.

violates Article 1, Sections 12 and 23 of the Indiana Constitution and the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

[7] But, as we stated in *Lindsey v. State*, 888 N.E.2d 319, 324 (Ind. Ct. App. 2008) (quotations and alterations omitted), *trans. denied*, since the *Canaan* decision, "both our Supreme Court and this court have repeatedly recognized that the fundamental error doctrine is not applicable in post-conviction proceedings." Rather, "[a] defendant in a post-conviction proceeding may allege a claim of fundamental error only when asserting either (1) deprivation of the Sixth Amendment right to effective assistance of counsel, or (2) an issue demonstrably unavailable to the petitioner at the time of his or her trial and direct appeal." *Id.* at 325 (quotations and alterations omitted). Other "free-standing" claims are not available for post-conviction review. *See id.*

[8] As in *Lindsey*, the legal claims Weis presented in his petition for post-conviction relief do not relate to the denial of counsel and were available to him on direct appeal. Further, Weis did not present any new evidence in his petition or by affidavit. Therefore, his claims were not available for post-conviction review. *Id.* Thus, the post-conviction court did not err when it dismissed Weis' petition pursuant to Post-Conviction Rule 1(4)(g). *See Pierce*, 882 N.E.2d at 737.

Issue Two: Findings and Conclusions

[9] Next, Weis contends that the post-conviction court erred when it did not enter specific findings of fact and conclusions of law under Indiana Post-Conviction Rule 1(6). A post-conviction court's order dismissing a petition for post-

conviction relief is generally improper if it fails to address the issues presented. *Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001), stated:

> A court that hears a post-conviction claim must make findings of fact and conclusions of law on all issues presented in the petition. *See* Ind. Post-Conviction Rule 1(6). The findings must be supported by facts and the conclusions must be supported by the law. *See Bivins v. State*, 735 N.E.2d 1116, 1121 (Ind. 2000), *reh'g denied*. Our review on appeal is limited to these findings and conclusions.

[10] However, our supreme court has held that, when the "facts underlying [the petition] are not in dispute' and the issues on appeal "are clear," a "general and conclusory judgment" from the post-conviction court is not reversible error. *Lowe v. State*, 455 N.E.2d 1126, 1128 (Ind. 1983). *Lowe* applies here. Therefore, the post-conviction court did not commit reversible error by entering a general order where, as here, there were no claims available for post-conviction review.

[11] In sum, we affirm the post-conviction court's summary denial of Weis' petition for post-conviction relief.

[12] Affirmed.

[13] Mathias, J., and Bradford, J., concur.